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IN RE PETITION FOR DECLARATORY  
RULING REQUIRING BELL SOUTH  
TELECOMMUNICATIONS, INC.  
TO HONOR EXISTING  
INTERCONNECTION AGREEMENTS

) Docket No.

04-00158

**PETITION FOR DECLARATORY ORDER**

XO Tennessee, Inc. ("XO") petitions the Tennessee Regulatory Authority, pursuant to T.C.A. § 4-5-223, to issue a declaratory order that BellSouth Telecommunications, Inc. ("BellSouth") must continue to honor its unbundling obligations as set forth in TRA-approved interconnection agreements ("ICAs") with XO and in BellSouth's Statement of Generally Available Terms ("SGAT"), pending resolution of judicial review of the Federal Communications Commission's ("FCC's") Triennial Review Order ("TRO")<sup>1</sup> and any resulting FCC action or additional TRA action

On March 2, 2004, the D.C. Circuit Court of Appeals vacated and remanded portions of the TRO in which the FCC established unbundling requirements for local switching, transport, and other unbundled network elements ("UNEs")<sup>2</sup>. The Court temporarily stayed its *vacatur* for sixty 60 days, or until May 2, 2004. The D.C. Circuit Court recently granted the FCC's unopposed motion to extend the stay until June 15, 2004. If there are no further extensions and the stay expires, the majority of the FCC rules governing the unbundling requirements under

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<sup>1</sup> *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003)

Section 251 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Act”), will no longer exist for local switching, transport, and other UNEs.

Since the issuance of the D.C. Circuit Court’s decision, BellSouth has notified XO that its obligation to provide UNEs has been eliminated by the Court’s decision and that those UNEs would become unavailable to XO after the Court’s order becomes effective. On March 23, 2004, BellSouth issued a Carrier Notification stating that “the Court vacated the FCC’s rules associated with, among other items, mass-market switching, thereby *eliminating* BellSouth’s obligation to provide unbundled switching and, therefore Unbundled Network Elements-Platform (UNE-P) at TELRIC rates ”<sup>3</sup> Thereafter, on April 22, 2004, BellSouth issued another Carrier Notification, stating that, “upon the [Court’s] effective *vacatur* of portions of the FCC’s [TRO], BellSouth’s obligation to provide dedicated transport and high capacity loops<sup>4</sup> as an unbundled network element pursuant to Section 251 of the Telecommunications Act of 1996 *will be eliminated*.”<sup>5</sup> Based on those Carrier Notification letters, XO understands that -- after June 15, 2004 -- BellSouth only intends to offer local switching and UNE-P pursuant to so-called “commercial agreements,” and that BellSouth intends to require that high capacity transport and loop UNEs (including dark fiber) be converted to special access circuits at significantly higher prices.

BellSouth, moreover, has not represented that it will continue to honor its obligations to

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<sup>2</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)

<sup>3</sup> BellSouth Carrier Notification SN91084043 to All CLECs Regarding Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Service (March 23, 2004) (emphasis added)

<sup>4</sup> Despite BellSouth’s reference to loops, *USTA II* addressed the nationwide impairment finding only with respect to switching and dedicated transport, and states that “the petitions for review are otherwise denied” (*USTA II* at page 62), thus, the court did not upset the impairment finding for high capacity loops. Without in any way conceding that the D.C. Circuit’s decision has any impact on high capacity loops, XO includes high capacity loops among the UNEs at issue in this pleading to ensure that the requested order applies to all UNEs affected by the D.C. Circuit’s decision.

<sup>5</sup> BellSouth Carrier Notification SN91084063 to All CLECs Regarding Commercial Offering for BellSouth Unbundled Network Element (UNE) Transport Transition (April 22, 2004) (emphasis added)

provide access to UNEs pursuant to Section 251 and 271 of the Act and its obligations under its existing ICAs and SGAT. Nor has BellSouth stated whether it will seek, as some other regional Bell carriers have done, to have those ICAs declared *void ab initio* or whether BellSouth intends to amend those ICAs and its SGAT to eliminate switching, transport, and high capacity loop UNEs. BellSouth's silence in this regard is deafening because, when the Court of Appeals' opinion becomes effective, BellSouth has every incentive to seek to revise all of its ICAs to eliminate those UNEs, including possibly even refusing to process any new XO orders for UNEs after June 15, 2004, initiating billing for existing circuits at special access tariff rates, and requiring mass migration of customers from dark fiber facilities to special access circuits. If BellSouth were to attempt such drastic self-help remedies, TRA should expect XO and others to initiate numerous, emergency TRA proceedings challenging BellSouth's actions.

BellSouth's statements on some matters and failure to announce its intentions on other matters in response to the D.C. Circuit Court's decision have created tremendous uncertainty with respect to the continued availability in the BellSouth region of local switching, transport, high capacity loop and dark fiber UNEs. XO currently obtains those UNEs under its ICA with BellSouth and uses those UNEs to provide service to its end user customers. Indeed, availability of UNE-P, unbundled transport, high capacity loop and dark fiber UNEs was a critical element in the TRA's decisions to endorse BellSouth's entry into Tennessee's interLATA marketplace. An immediate elimination of those UNEs at TRA-prescribed rates developed using Section 252(d) pricing standards would have a devastating impact on BellSouth's Tennessee local exchange competitors and more importantly, on end user customers, particularly those customers who obtain service from providers other than BellSouth.

Accordingly, XO urges the TRA to issue an order requiring BellSouth to continue to honor all of its unbundling obligations set forth in existing ICAs and its SGAT, including the provisioning of unbundled local switching, dedicated transport, and high capacity loops at Section 252(d) compliant rates, until final federal unbundling rules are promulgated, or until the TRA can undertake a proceeding to determine the impact of the D.C. Circuit Court's decision on BellSouth's existing obligations to provide those UNEs. Such a proceeding, which would presumably involve all interested members of the industry, would most efficiently make use of the time and resources of the agency, its staff and the parties. That proceeding should address, but should not necessarily be limited to, the following issues:

- a. Whether the D.C. Circuit Court's decision represents a "change in law" and, thus, permits BellSouth to seek to amend or modify its obligation to provide UNEs, or whether BellSouth remains obligated to provide UNEs pursuant to Section 251 of the Act. The Act establishes BellSouth's obligation to provide UNEs, and even in the absence of FCC rules, existing ICAs and SGAT provisions requiring BellSouth to provide UNEs are fully consistent with, and required by, the Act.
- b. Whether BellSouth remains obligated to provide UNEs pursuant to Section 271 of the Act at the rates, terms, and conditions established by the TRA. BellSouth obtained authority to provide interLATA services in Tennessee due to its compliance with the competitive checklist, and having now received the benefit of such compliance, BellSouth should not be permitted to dismantle the competitive checklist altogether to the detriment of both competitors and consumers.
- c. Whether, as a matter of Tennessee law, BellSouth should be required to provide UNEs at Section 252(d) or comparable TRA-prescribed rates. Section 252(d)(3)

of the Act expressly preserves the authority of state commissions to enforce their own requirements with respect to access to, and interconnection with, incumbent facilities. The TRA has such authority under state law pursuant to T C A § 65-4-124.

XO does not seek to preclude parties from voluntarily negotiating amendments to their ICAs to incorporate all or part of the TRO or to prevent any negotiations in the wake of the D.C. Circuit Court's decision. Rather, XO's objective is to ensure that BellSouth will not unnecessarily expend party and TRA resources after June 15, 2004 by seeking prematurely to force XO and others to amend their existing ICAs, or by acting unilaterally to eliminate provisioning of existing UNEs at Section 252(d) rates, until critical issues have been resolved at both the federal and state levels.

The TRA has ample authority to require BellSouth to continue to comply with its obligations under existing ICAs and the SGAT. The TRA has reviewed -- and in many cases arbitrated -- each effective ICA in Tennessee, and the TRA spent several years establishing the rates, terms, and conditions in BellSouth's SGAT. The TRA has long asserted jurisdiction under state law to enforce those agreements. *See, e.g.*, T.C.A. §§ 65-4-117, 65-4-104, 65-4-124 and 65-5-210. Issues concerning the extent to which BellSouth must comply with its obligations under those agreements fall squarely within the TRA's jurisdiction and authority to interpret applicable federal legal requirements and to prescribe appropriate rates, terms, and conditions for unbundled access to BellSouth's network in Tennessee

The TRA also has independent authority under state law to require BellSouth to continue to provide existing UNEs under both current ICAs and BellSouth's SGAT. The Tennessee Telecommunications Act of 1995, which predated the federal Act, requires all telecommunications carriers to "provide non-discriminatory interconnection to their public

networks under reasonable terms and conditions; and to the extent that it is technically and financially feasible,... [provide such] desired features, functions and services promptly, and on an unbundled and non-discriminatory basis.” T.C.A. § 65-4-124 Based on these statutory provisions, the agency has repeatedly stated that it has jurisdiction under both state and federal law to conduct arbitrations, interpret and enforce ICAs, and resolve disputes related to interconnection Tennessee law, thus, provides more than ample authority for the TRA to enter the declaratory order requested here.

The TRA should not permit the potential chaos created by the FCC and the D.C. Circuit Court to materially and adversely affect the ability of Tennessee consumers to have an effective choice of local service providers. Accordingly, the TRA should require BellSouth to maintain the *status quo* until the federal dispute over the availability of UNEs has been resolved or until the TRA can conduct the appropriate proceedings to determine whether, in the absence of federal rules, BellSouth should be required to provide these UNEs on some other basis.

### **REQUEST FOR RELIEF**

**WHEREFORE**, XO requests the following relief:


A. An order from the TRA requiring BellSouth to continue to provide access to UNEs under the current rates, terms and conditions of its existing ICAs and the SGAT, including the provisioning of unbundled local switching (including UNE-P), transport, high capacity loops and dark fiber at TRA-prescribed rates established under Section 252(d) standards, until final federal unbundling rules are in place or until the TRA can undertake a generic proceeding to determine the impact of the D.C Circuit Court’s decision on BellSouth’s existing obligations to provide UNEs; and

B. Such other or further relief as the TRA finds just and reasonable.

Dated this 21 day of May, 2004.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC


By   
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing is being forwarded electronically, to

Guy Hicks  
BellSouth Telecommunications, Inc.  
333 Commerce Street, Suite 2101  
Nashville, Tennessee 37201-3300

on this the 21st day of May, 2004.

  
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Henry Walker